



**Comments of**

**TechFreedom**

Berin Szóka,[1] Vinny Sidhu,[2] & Graham Owens[3]

&

**The American Legislative Exchange Council**[4]

Jonathon Hauenschild[5]

**In the Matter of**

*Notice of Proposed Rulemaking – Restoring Internet Freedom*

WC Docket No. 17-108

**August 30, 2017**

---

[1] Berin Szóka is President of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He can be reached at bszoka@techfreedom.org.

[2] Vinny Sidhu is a Legal Fellow at TechFreedom. He can be reached at vsidhu@techfreedom.org.

[3] I. Graham Owens is a Legal Fellow at TechFreedom. He can be reached at gowens@techfreedom.org.

[4] The American Legislative Exchange Council is the nation's largest voluntary membership organization for state legislators. The ALEC mission is to "increase individual liberty, prosperity and the well-being of all Americans by promoting the principles of limited government, free-markets and federalism." For more information, please visit www.alec.org.

[5] Jonathon Hauenschild is the Director of the ALEC Task Force on Communications & Technology. He can be reached at jhauenschild@alec.org.

## Table of Contents

# I. Introduction

The debate over "net neutrality" and its implications for federal regulation has been an intensely-debated topic. The Supreme Court's ruling in *Verizon v. FCC*, as well as the imposition of Title II "telecommunications services" classification under the FCC's 2015 Open Internet Order, has sparked discussion over the proper nature and scope of broadband regulation. An often-overlooked aspect of this debate is the effect of this regulatory structure on federalism and state sovereignty. This comment, filed in conjunction with TechFreedom's more detailed reply comments,[6] discusses the following legal issues.

1. We do not believe Section 706 can permissibly be read as conferring regulatory authority independent of any other provision of the Telecommunications Act of 1996. But under the FCC's 2010 reading of it as such, affirmed by the *Verizon* court under *Chevron* (with scant analysis), this reading confers power (and duties) not only upon the FCC but upon state public utility commissions (PUCs) as well — giving them sweeping new powers never granted to them by their legislatures. This effects a significant intrusion upon the sovereignty of the states, reallocating decision-making power as between state legislatures and PUCs.
2. The federalism implications of the FCC's interpretation of Section 706 made it judicial error for the D.C. Circuit to ground its decision in *Verizon* to uphold the FCC's 2010 transparency rule in Section 706, when the FCC had made a simpler ancillary jurisdiction argument for that rule based on Section 257. As such, the court's discussion of the meaning of Section 706 in *Verizon* as well as *US Telecom* remains dicta.
3. The major questions, political question, and non-delegation doctrines counsel against a judicial resolution of the FCC's Title II reclassification. Because states formed their legal and regulatory regimes around a Title I "information services" classification, the FCC's Title II reclassification creates confusion and uncertainty regarding the power, duties, and jurisdiction of state PUCs.

We conclude by discussing state level remedies that will be available under state law as part of the layered approach to policing broadband that will be restored when the FCC reverses its interpretation of Section 706 and its reclassification of broadband providers as common carriers subject to Title II, as TechFreedom and ALEC have argued the FCC should do in their separate comments.[7] Such state remedies have received far too little attention in

[6] TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017),

[7] *See,* TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017), The American Legislative Exchange Council, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017).

the discussion of how to police Internet service provider (ISP) behavior. The availability of robust remedies to state attorneys general and private plaintiffs should allay, at least to some degree, concerns that the Republican-led Federal Trade Commission and Department of Justice will be insufficiently aggressive in policing the broadband market. We discuss, in particular, a lawsuit recently filed by the Democratic Attorney General of New York.

Whatever their limitations, application of state statutory and common-law remedies to net neutrality problems would at least avoid the constitutional and jurisdictional problems raised by the FCC's interpretations of Section 706 and Title II.

## II. Section 706

In 2010, the FCC reinterpreted Section 706 as a grant of authority independent of any other provision of the 1996 Telecommunications Act or 1934 Communications Act. If true, the FCC's reinterpretation of Section 706(a) conferred the same broad power — indeed, according to the FCC, an affirmative *duty* — upon (certain) state PUCs as upon the FCC itself. This intrudes upon the sovereignty of the states, transferring decision-making authority concerning the communications sector (not just broadband) from state legislatures to state PUCs.

### A. The D.C. Circuit's Analysis of Section 706

In *Verizon v. FCC*, the D.C. Circuit Court of Appeals held, in part, that the FCC's 2010 interpretation of its own authority under Section 706 of the Telecommunications Act of 1996 was "reasonable" and that the FCC had substantial scope to "adopt... rules in order to promote competition and investment in voice, video, and audio services."[8] Section 706(a) provides:

> The Commission and *each State commission* with regulatory jurisdiction over telecommunications service *shall* encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[9]

[8] 25 FCC Rcd. 17905 (2010) ¶ 1.

[9] 47 U.S.C. § 1302(a) (emphasis added).

Given that the first clause explicitly conjoins the FCC and "each State commission," if Section 706(a) is an independent grant of authority for the FCC, it must be such for state commissions, too. The *Verizon* majority devoted a single paragraph to the implications of this for the FCC's interpretation of Section 706:

> Verizon contends that Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities. But Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here. See, e.g., id. § 251(f) (granting state commissions the authority to exempt rural local exchange carriers from certain obligations imposed on other incumbents); id. § 252(e) (requiring all interconnection agreements between incumbent local exchange carriers and entrant carriers to be approved by a state commission); see also AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366, 385–86 (1999) (describing the Commission's power and responsibility to dictate the manner in which state commissions exercise such authority). Thus, Congress has not "directly spoken" to the question of whether section 706(a) is a grant of regulatory authority simply by mentioning state commissions in that grant. Chevron, 467 U.S. at 842.

The *Verizon* majority here made two errors: (1) opining on the meaning of Section 706 when there was no reason to do so (except to explain why Section 706, even if it were grant of authority, could not support the no-blocking and discrimination rules) and (2) rushing into Step One of *Chevron*[10] without considering whether *Chevron* deference was appropriate in light of two federalism questions raised by the FCC's reading of Section 706, (a) intrusion upon the sovereignty of the states and (b) the implication that state PUCs have been given, *sub silentio*, new powers over interstate commerce, as well as (c) major questions posed by the grant of so sweeping a claim of power over the Internet. On the last point, the particular examples cited by the court to note that Congress had granted states similar powers in other circumstances, Sections 251(f) and (e), are narrow, clear grants of authority to state Commissions — completely unlike the sweeping grant of discretion to do whatever will promote broadband conferred by the FCC's reading of Section 706(a).

[10] "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984).

## B. The FCC's Previous Understanding of Section 706

The FCC's 1998 Advanced Services Order declared that, "in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."[11] Under this reading, Section 706 was understood, at least prior to the FCC's reinterpretation of it, to have "mostly served as a vehicle for engaging in inquiries regarding broadband deployment in the United States" with the states only playing an "advisory role."[12] Importantly, the states responded to these inquiries by passing "state legislation that echoed the general deregulatory tenor of the FCC action in this space."[13] In other words, Section 706 established a general, national goal of promoting broadband deployment, commanding the FCC and state PUCs to use the powers *otherwise given to them* to achieve that goal. In other words, the "shall" in Section 706(a) was interpreted in a narrow sense, reflecting the general consensus that federal and state cooperation, not coercion, was the underlying framework for the Telecommunications Act.

The Advanced Services Order recognized some state role in regulating broadband ("advanced services"), but that the FCC "encouraged" states to "treat those services the same regardless of whether they were provided by an incumbent telephone company or any other competing carrier offering advanced services."[14] The specific use of the word "encouraged" suggests that the FCC viewed its statement as aspirational, rather than as a direct command. It also suggests that the FCC viewed its jurisdiction in this space as limited to what it perceived as its role and capabilities under Section 706. This further supports the conclusion that the FCC itself did not view Section 706 as an independent grant of authority, but rather as a statement of general principle to be applied in the exercise of the powers expressly granted by Congress or ancillary jurisdiction (which itself must be grounded in some specific power granted by Congress).[15]

The FCC was not alone in viewing the regulatory scheme of Section 706 as drawing clear lines between federal and state regulatory authorities. Rather, state PUCs came to the same conclusions regarding legislative intent. In February 1999, the National Association of Reg-

---

[11] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. August 7, 1998) (Advanced Services Order and NPRM).

[12] Charles M. Davidson & Michael J. Santorelli, *Broadband, the States & section 706: Regulatory Federalism in the Open Internet Era*, Hastings Sci & Tech. L.J. at 3 (2016).

[13] Id. at 4.

[14] The Advanced Services Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 F.C.C. Rcd. 24012, 24047 (1998).

[15] *Comcast Corp. v. FCC*, 600 F. 3d 642, 646 (D.C. Cir. 2010).

ulatory Utility Commissioners (NARUC) released a resolution that "committed state commissions and the FCC to take full advantage of their complementary strengths, and identified several specific practices which may be applied in various contexts in order to do so."[16] The carefully-worded use of "complementary" to describe the relationship between the FCC and state PUCs served the dual purpose of signaling to the FCC how NARUC viewed Section 706, as well as further entrenching this interpretation into what was already the extant structure. By drawing clear lines of authority, NARUC signaled its agreement with the FCC's narrow interpretation of Section 706.

The creation of, and justification for, the Federal-State Joint Conference on Advanced Services (Joint Conference) further clarified the FCC and NARUC's interpretations of their respective regulatory roles. The FCC described the Conference's purpose as minimizing "potential inconsistencies and overlaps between federal and state policy," formalizing NARUC's original conception of the forum.[17] The necessity of a forum to minimize redundancies would suggest the existence of two distinct regulatory authorities that are looking to maximize synergies. The implication is that the FCC did not have the authority to resolve these inconsistencies through the exercise of its own power. This would mean that Section 706 was viewed as having express limitations that required regulatory cooperation with state PUCs. Therefore, Section 706 was not viewed as an independent grant of authority to the FCC, but rather a general statement of policy that encouraged broadband-based cooperation.

### C. Post-Verizon Role of Section 706

Given the historical trajectory of FCC and state regulatory interpretation, the FCC's 2010 Open Internet Order represented a significant break from precedent. The FCC began to claim that Section 706 allowed "the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision," specifically noting that "to the extent the [1998 order] can be construed as having read Section 706(a) differently, we reject that reading of the statute."[18] Thus, the FCC and state PUCs were now permitted to claim authority sole based

[16] Bob Rowe, Strategies to Promote Advanced Telecommunications Capabilities, 52 Fed. Comm. L. J. 381, 402 (2000), available at http://www.fclj.org/wp-content/uploads/2013/01/rowe.pdf.

[17] Federal-State Joint Conference on Advanced Telecommunications Services, CC Docket No. 99-294, Order, FCC 05-25 (rel. Feb. 9, 2005).

[18] 25 FCC Rcd. 17905, 17,969, ¶ 118.

on Section 706(a), so as long as the means utilized were not inconsistent with federal or state constitutional or statutory provisions.

### D. The D.C. Circuit's Discussion of Section 706 Was Dicta

Although the *Verizon* court upheld the constitutionality of the disclosure rule in the 2010 Open Internet Order, the decision has been improperly understood as upholding the FCC's reading of Section 706. Rather, this remaining text is better understood as dicta, and thus lacking in binding authority. Specifically, this is because Section 706 was not necessary for the court's findings.

The court struck down the 2010 Open Internet Order's rules against blocking and unfair discrimination for wrongfully imposing common-carrier obligations on non-common carriers (or because the FCC had failed to explain why the rules did not do so), Verizon expressly disclaimed any intention to challenge the disclosure rule.[19] As Judge Silberman noted in his dissent, the disclosure rule could have been upheld under the FCC's claims of ancillary authority under Section 257.[20] Thus, in effect, the *Verizon* majority used litigation over the other two rules in the Open Internet Order to issue an advisory opinion about the meaning of Section 706. That may well have been necessary to explain why the court could not uphold the no-blocking and discrimination rule, *even* if Section 706 were a grant of authority, but this assumption *arguendo* cannot constitute binding precedent.

The reason this was judicial error, rather than a question of how to draft the court's opinion entrusted to the court's discretion, turns on (among other things) the implications of the FCC's interpretation of Section 706(a) for federalism. The doctrine of constitutional avoidance mandates that a federal court must decide a case in a manner that poses the least constitutional difficulties.[21] Because the *Verizon* court's reading of Section 706 raises potential Dormant Commerce Clause issues and was not essential to the holding, it violated this doctrine. Therefore, it was judicial error for the court to even engage in this discussion and, *a fortiori*, to consider it binding authority.

---

[19] *Verizon v. FCC*, 740 F.3d 623, 650–59 (D.C. Cir. 2014).

[20] *Id.* at 668 n.9 (Silberman, J., dissenting).

[21] The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

## E. Constitutional Issues Raised by the FCC's Discussion of Section 706

Even if treated as binding, the *Verizon* court's Section 706 discussion would raise constitutional questions. TechFreedom's reply comments address the major questions raised by the FCC's reading of Section 706.[22] Here, we focus on the federalism questions raised by that reading.

Section 706(a), through the use of the conjunctive "and," creates concurrent regulatory jurisdiction for both the FCC and state PUCs.[23] The Supreme Court has interpreted the Dormant Commerce Clause as preventing states from regulating interstate commerce, unless Congress affirmatively gives them the power to do so.[24] The Supreme Court has required Congress to be "unmistakably clear" when interposing federal authority within a state's own constitutional structure, shifting authority for making decision-making from one part of state government to another.[25] Indeed, it was for exactly this reason that the Sixth Circuit last year blocked the FCC's attempt to use Section 706 to preempt state laws governing deployment of municipal broadband networks — an order the FCC found so obviously unconstitutional on federalism grounds that they found no need to examine the meaning of Section 706 (recognizing that any such discussion would itself have been dicta).[26]

Unlike the deferential standard of *Chevron*, which allows agencies to enforce "permissible" interpretations of ambiguous statutes,[27] this "unmistakably clear" standard requires a much higher burden of proof to satisfy constitutional scrutiny. In fact, the D.C. Circuit has made clear that the "canon of constitutional avoidance trumps *Chevron* deference."[28] This means that courts are restricted from permitting agency deference if there is, as the D.C. Circuit put it, a "serious constitutional difficulty."[29] The "unmistakably clear" standard required by the Supreme Court would have to be met to avoid raising such difficulties. If this standard cannot be met, the doctrine of constitutional avoidance would require a simpler

---

[22] TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017), at 73.

[23] *See* 47 U.S.C. § 706(a) (2012).

[24] TechFreedom & Int'l Ctr. For Law & Econ., Comment Letter on Proposed Rule Protecting and Promoting the Open Internet et. al., at 76 n.252 (July. 17, 2014), available at http://docs.techfreedom.org/TechFreedom-ICLE_Legal_Comments_on_2014_FCC_Net_Neutrality_NPRM.pdf [hereinafter TechFreedom & Int'l Ctr. For Law & Econ.]

[25] *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90 (1984).

[26] *Tennessee v. Nat'l Ass'n of Regulatory Utillity Comm'r*, Nos. 15-3291/3555 (6th Cir. Aug. 10, 2016) available at http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0189p-06.pdf.

[27] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

[28] *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012), *at* 12.

[29] *Id*. at 13.

reading of Section 706(a); namely, a reading that does *not* imply new state regulatory authority over interstate commerce.

The scale and scope of the broadband industry would seem to preclude the interpretation of state regulation of broadband as entirely "intrastate." Even though municipal broadband is physically restricted to a state's borders, its effects are inherently interstate. Federal courts have deemed various local laws as violating the Dormant Commerce Clause, on the basis of impermissible extraterritorial regulation.[30] Therefore, intrastate regulation has clear effects on interstate commerce.

As a result, Congress would have to make it "unmistakably clear" that it intended to delegate state PUCs additional authority under Section 706 to regulate broadband. Section 706 explicitly promotes the development and deployment of advanced telecommunications capabilities on a "reasonable and timely basis" by promoting the removal of "barriers to infrastructure investment."[31] A national regulatory structure with varying state rules and regulations would inevitably slow down a broadband company's ability to identify and comply with them. It seems unlikely that Congress would have perceived this sort of a regulatory regime as conducive to greater speed of investment. At the very least, it is impossible to declare that Congress made it "unmistakably clear" that this was their intent — while also relying upon the argument that Section 706 is ambiguous in order to invoke *Chevron* and claim deference in interpreting Section 706. As a result, it is impossible to declare that this interpretation of Section 706 avoids constitutional questions.

Independent of FCC action, the binding interpretation of the *Verizon* court's 706(a) interpretation could continue to justify expanded state regulatory authority over interstate commerce. Specifically, this means that a re-interpretation of FCC authority under Section 706 would not be sufficient to curtail state claims of expanded authority under a broad reading of *Verizon*. Under this scenario, the FCC would pursue a policy that advocates for a divestiture of authority. As such, *Chevron* deference would lead to an outcome where the FCC interprets its Section 706 powers narrowly, *i.e.*, restricted to expressly delegated powers with no independent grant of authority, yet state PUCs could still claim that the *Verizon* case supports their broader interpretation of Section 706(a).

However, the *Brand X* decision would preclude this interpretation. In that case, the Supreme Court held that "a Court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its

[30] TechFreedom & Int'l Ctr. For Law & Econ., *supra* note 24, at 77 n.259.

[31] 47 U.S.C. § 706(a) (2012).

construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[32] In this case, the FCC's new, restricted interpretation would be entitled to deference because, by the Court's own admission in *Verizon*, "Congress has not 'directly spoken' to the question of whether section 706(a) is a grant of regulatory authority."[33] Therefore, Section 706(a) would have to be read narrowly, and not as an independent grant of authority to state PUCs.

Furthermore, future appellate decisions could eventually overrule *Verizon* under *Chevron* deference, leading to a situation where state PUCs may claim expansive powers under dubious legal authority. Federal courts would have to decide whether to strike down all the different state interpretations of regulatory jurisdiction, or defer to state agency interpretations.

Based on the *Verizon* court's misapplication of judicial doctrine, the *Verizon* court's discussion of Section 706(a) should not be viewed as binding. Rather, this discussion should be viewed as dicta that reflected a non-binding aspect of the decision. As such, an expansive interpretation of Section 706(a) that creates an independent grant of authority for the FCC and state PUCs is unjustified. Therefore, the FCC can and should reverse its 2010 interpretation of its Section 706 authority. If a broad reading of the *Verizon* decision is accepted, it will cause judicial confusion and conflict that would hinder and possibly subvert implementation of congressional goals under the Telecommunications Act.

### F. The Sixth Circuit Decision

The Sixth Circuit decision in *Tennessee v. FCC* further how courts might interpret Section 706 when conducting a full reading of the statute. In particular, the Sixth Circuit took care to note:

> Our holding today is a limited one. We do not question the public benefits that the FCC identifies in permitting municipalities to expand Gigabit Internet coverage. Furthermore, we need not, and do not, address a number of legal issues debated by the parties, including (1) whether § 706 provides the FCC any preemptive power at all…[34]

And yet, it is not difficult to tease out the implications of the court's analysis for the meaning of Section 706. If Section 706(a) is not sufficiently clear to constitute a grant of authori-

---

[32] *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688 (2005) [Brand X], *at* 3.

[33] *Verizon v. FCC*, 740 F.3d 623, 650–59, *at* 23.

[34] *Tennessee v. FCC*, 832 F. 3d 597, 613 (6th Cir. 2013).

ty for the FCC to preempt state laws, what *is* it sufficiently clear about in the powers it supposedly grants to — and the duty it imposes upon — state PUCs? The less clear it is that Section 706(a) satisfies the constitution's standard for conferring any such powers, the less plausible the FCC's reading of Section 706 is. If Section 706(a) is not sufficiently clear to confer any powers or duties upon state PUCs, the FCC's interpretation would render it a nullity — suggesting that the FCC's interpretation is simply wrong.[35]

Viewing Section 706 as an independent grant of authority is inconsistent with prior understandings of the FCC's authority and with a proper understanding of the discussed court cases. An expansive interpretation of Section 706 would cause significant federalism and state sovereignty issues by blurring the lines of federal vs. state authority and by affecting the nature and scope of state PUC power, duties, and jurisdiction. A narrower reading of Section 706 would help avoid causing and/or exacerbating constitutional and jurisdictional problems. The FCC should revert to its original understanding: that Section 706 is a commandment as to how the agency should use its other, expressly-delegated powers, and *not* an independent grant of regulatory authority.

## III. Title II

The FCC's classification (and potential de-classification) of broadband as a telecommunications service subject to Title II common carrier regulation has major political, jurisdictional, and economic ramifications for federal and state entities.[36] As such, judicial analysis of Title II must be careful to analyze the issue in the proper doctrinal context. Title II classification has created confusion and uncertainty as to its effects on state PUC power and jurisdiction. A return to a Title I classificatory regime would remove these issues by returning to preconceived notions of state regulatory authority, and by resolving potential federalism and state sovereignty concerns.

### A. The "Major Questions" Doctrine

Under *Chevron* deference, the courts must defer to "permissible" interpretations of ambiguous statutes.[37] However, the courts have not recognized this deference as unqualified. In *Brown & Williamson*, the Supreme Court found that judicial analysis "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy

[35] *See, e.g.,* Ronald J. Scalise, Jr., *Rethinking the Doctrine of Nullity*, Louisiana Law Review, Vol. 74, No.3 (Spring 2014), *available at* http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6458&context=lalrev.

[36] TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017), at 54.

[37] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

decision of such economic and political magnitude."[38] They went on to state that an agency's policy "must always be grounded in a valid grant of authority from Congress."[39] In reference to the tobacco industry, the Court stated that the FDA was "asserting jurisdiction to regulate an industry constituting a significant portion of the American economy" without clear authority from Congress to do so.[40] In *King v. Burwell*, the Supreme Court stated that, on issues "implicating billions of dollars in spending each year" and affecting "millions of people," the Court must "determine the correct reading" of the statute in question.[41]

Title II broadband regulation certainly represents a question of significant economic and political magnitude. The industry serves 85% of Americans, and invested $1.3 trillion of private capital in broadband infrastructure between 1996 and 2013.[42] The size, scope, and substance of Title II broadband regulation certainly touches upon issues of political significance, affecting both the nature of the debate and the composition of the political coalitions engaging in it. The economic and social impact of Title II regulation seems to meet the *Burwell* test in terms of substance and volume. As Judge Kavanaugh has noted, the FCC's 2015 Open Internet Order affects "every Internet service provider, every Internet content provider, and every Internet consumer."[43] Therefore, Title II broadband regulation should be seen as a "major rule" that is not entitled to *Chevron* deference — as explained in further detail in TechFreedom's comments.[44]

Under this framework, the FCC would not be entitled to deference for its interpretations of its own regulatory power over broadband. Instead, the judiciary would have the right, and a duty to, determine the correct reading of the statute. A correct reading of the statute would involve identifying the source of the FCC's claimed authority and analyzing whether that source delegates the claimed authority. But as Judge Kavanaugh argues, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, "does not supply *clear* congressional authorization for the FCC to impose common-carrier regulation on In-

[38] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

[39] *Id.* at 161.

[40] *Id*. at 159.

[41] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

[42] Patrick Brogan, USTelecom, Latest Data Show Broadband Investment Surged In 2013 (Sept. 8, 2014), available at http://goo.gl/Cpo9hc).

[43] *U.S. Telecom Ass'n v. F.C.C.*, 855 F.3d 381, 417 (2017) [hereinafter U.S. Telecom II] (en banc) (Kavanaugh, J., dissenting).

[44] TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017), at 21.

ternet service providers."[45] Therefore, because Congress did not *clearly* authorize Title II regulation, the FCC should be prohibited from applying it.

Furthermore, the political questions doctrine raises concerns as to whether the judiciary is the appropriate forum to decide Title II questions. One of the categories of applicability that the Supreme Court has articulated has to do with the justiciability of political questions dealing with issues of "prudence."[46] The vast political and public attention that the Title II debate has received would suggest that this issue is one of immense political significance."[47] As the Supreme Court laid out in *Baker v. Carr*, prudence "counsel[s] against a court's resolution of an issue" where it may create a "lack of respect due coordinate branches of government."[48] The nature, length, and virulence of the congressional debate over Title II suggests that the rule is indeed of a political nature, and exactly the type of question that requires an exercise of "prudence" from the judiciary.[49] As the *Verizon* court stated, because the "question of net neutrality implicates serious policy questions," the FCC could not "exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."[50] It would be hard to believe that Congress clearly intended to delegate such substantial administrative authority to the FCC when it poses significant questions of state sovereignty and constitutional authority. Therefore, at the very least, the political questions doctrine should preclude the judiciary from skipping Chevron Step Zero in any Title II decisions.

The non-delegation doctrine raises concerns as to whether Congress actually delegated Title II (and even Internet) regulatory powers. In the *Benzene* case, the Supreme Court said that an agency interpretation of a statute that expands its regulatory powers without the presence of a "significant risk" that would be mitigated by the expansion "would make such a sweeping of legislative power that it might be unconstitutional" and that a statutory construction that avoids this kind of "open-ended interpretation" is preferable.[51] In *Int'l Union v. OSHA,* the D.C. Circuit said that an immense regulatory scope "encompassing all American enterprise" necessitated precise standards to avoid violating the non-delegation doctrine.[52]

---

[45] *U.S. Telecom II*, 855 F.3d at 417 (Kavanaugh, J., dissenting).

[46] *See generally* Political Questions, Public Rights, and Sovereign Immunity, 130 HARV. L. REV. 723 (2016) (discussing political question doctrine's origin and application generally.

[47] TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017), at 24.

[48] *Baker v. Carr,* 369 U.S. 186, 217 (1962).

[49] TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017), at 24.

[50] *Verizon*, 740 F.3d at 634.

[51] *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (The Benzene Cases)*, 448 U.S. 607, 645, 646 (1980).

[52] *Int'l Union v. OSHA*, 938 F.2d 1310, 1315–21 (D.C. Cir. 1991).

The Internet stands as a significant driver of economic and commercial activity. Given that a large portion of "American enterprise" is conducted over the Internet, it would seem to qualify as requiring precise standards, rather than broad, sweeping Title II authority. Therefore, at the very least, there is an outstanding question as to whether the FCC can impose Title II regulation on the communications industry.

## B. Effect of Title II Classification on State PUCs

The history and development of telecommunications regulation has followed a distinct pattern. Specifically, the 1996 Telecommunications Act amended the 1934 Communications Act to account for the development of advanced telecommunications services, classifying them as Title I "information services."[53] In accordance with this interpretation, state legislatures passed laws that regulated broadband services as "information services." Therefore, the FCC's reclassification of broadband providers from Title I "information services" to Title II "telecommunications services" was not contemplated or anticipated when forming these laws. This has created a situation where it is unknown or unclear what the scope of state PUC power is under the new regulatory regime, and whether state PUCs have authority to regulate in different, fact-specific situations.

The FCC purports to address these concerns in a couple of distinct ways. First, the Title II Order states that the FCC will forbear from enforcing some of the Title II requirements in order to allay fears of state sovereignty violations and avoid confusion about enforcement jurisdiction and mandates. However, under the law and the Order, states would not be allowed to enforce provisions that the FCC elects to forbear.[54] The practical effect of this would be to allow the FCC to control state action through "forbearance," because states would not be allowed to enforce any laws that run counter to the FCC's wishes, thereby raising new concerns over state sovereignty and enforcement powers. Furthermore, the Order itself acknowledges that promises to forbear "do not have the force of a legal rule that prevents [the Commission] from [applying Title II's more onerous provisions] in the future."[55] This creates a situation where the FCC would be free to curtail forbearance at-will, creating unpredictability and volatility for states and broadband companies.

Second, the Title II Order states that the FCC has the power to preempt state authority to regulate broadband when it conflicts with the Order.[56] Specifically, it states that preemp-

---

[53] Communications Act of 1934, 47 U.S.C. § 153(20) (2012).

[54] *See*, e.g. 47 U.S.C. § 160(e), Title II Order, 30 FCC Rcd at 5803, ¶ 432.

[55] See 30 FCC Rcd. 5601, 5656 ¶ 127, nn. 301, 302.

[56] *Id.* at 5804, ¶ 433.

tion will "proceed on a case-by-case basis in light of the fact specific nature of particular preemption inquiries."[57] The claim that the FCC can usurp state regulation of broadband through a broad claim of power is far from clear. The Sixth Circuit "clear statement" standard requiring clear congressional authority to preempt state laws regulating broadband under Section 706 could have an analog here under Title II authority, which would make the FCC order insufficient because there is no "clear statement" to regulate in this way.[58] Furthermore, federal preemption authority under such a broad mandate would create separation of powers issues that disrupt existing conceptions of federalism and create avenues for expansion of federal power. The "case-by-case" nature of preemption inquiries would risk arbitrary enforcement and usurpation of state regulatory power, which would introduce uncertainty into the broadband industry and likely delay the expeditious, efficient deployment of broadband.

Title II classification will not only affect state legal and regulatory structures. Rather, it could create conflicts of jurisdiction and enforcement with smaller political subdivisions, i.e. city, county, localities. In *City of Eugene v. Comcast of Oregon II*, the Supreme Court of Oregon stated, in reference to the 2015 Open Internet Order, that "the FCC's order subjects the provision of cable modem services to certain telecommunications regulations that were not previously applicable."[59] This creates an opening for state PUCs to expand their power and jurisdiction to areas not contemplated by state legislatures, thus subverting legislative intent and the separation of powers. It could also spread the problem by creating judicial precedent that is emulated by other state courts.

Because the text and interpretations of various provisions of state law may differ from state to state, it creates uncertainty as to the full effect of Title II classification. Alabama law exempts "broadband services" and "broadband enabled services" from state regulation, but also prohibits their state PUC from imposing obligations that "exceed in degree or differs in kind from the requirements of the Federal Communications Commission."[60] This could mean that broadband services would remain exempt from state regulation, or it could mean that "differs in kind" is interpreted as requiring state PUC obligations to match FCC obligations. Tennessee law exempts broadband access services from state regulation, but one provision in the code states "nothing in this part shall permit any carrier to treat services that constitute telecommunications services under federal law as non-

[57] *Id.*

[58] *Tennessee v. FCC*, 832 F.3d 597, 600 (6th Cir. 2016).

[59] *City of Eugene v. Comcast of Oregon II, Inc.*, 375 P.3d at 453; see also Tennessee, 832 F.3d at 452-453, 461.

[60] Ala. Code § 37-2A-4(a) (West 2017).

telecommunications services for any purpose under state law."[61] This could mean that broadband services would remain exempt from state regulation, or it could mean that Title II classification shifts state classification to "telecommunications" and subjects it to state PUC jurisdiction. Judicial resolution of these ambiguities could alter the contemplated definitions and change the scope of authority delegated by state legislatures.

Therefore, Title II classification creates serious federalism and state sovereignty issues. A better approach would return to a Title I "information services" classification. Because states deliberated, passed, and applied their state laws under the Title I framework, their laws would be better suited to, and more workable under, this original regime. Title I classification would return to the *status quo ante*, and thus avoid distorting state regulatory powers, subverting state laws, and causing greater confusion. As such, the Commission should take appropriate steps to achieve this outcome.

## IV. State Law Remedies

The existence of state law remedies for ISP wrongdoing allows for consumer protection and helps police bad behavior. However, federal expansion of state regulatory authority would create a dual enforcement capacity that would give states greater prosecutorial reach and discretion, while introducing greater uncertainties into the broadband market. These state law remedies could be manifested through the application of state statutes or the common law.

### A. State Statutes

Many states already possess the means and capability to police broadband providers and pursue wrongdoing. State statutory authority generally includes antitrust and consumer protection provisions that provide agencies with jurisdiction to pursue bad actors and provide private parties with rights of action. Because these statutes tend to cover a range of action, they represent an extant broadband enforcement capacity that should be utilized as part of a larger regulatory strategy.

#### 1. Antitrust

Antitrust statutes provide a layer of protection against the monopolization or excessive market concentration of an industry. Although these statutes vary in the scope and substance of their applicability, they all generally borrow language from the federal Sherman

[61] Tenn. Code Ann. § 65-5-202(b) (LexisNexis 2017).

Antitrust Act. States have sought to regulate competition through broad descriptions of wrongdoing, e.g. fair trade, price discrimination, and sales-below-cost statutes.[62] The broad nature of these statutes means a large range of industry conduct can be encompassed under them. For broadband regulation, this suggests that states already possess one means to pursue and enforce civil or criminal charges against offending ISPs.

Blocking, throttling, or other discriminatory conduct or practices could be viewed as an unfair restraint of trade or violation of some fair-trade provision. California's Cartwright Act prohibits any agreements among competitors to restrain trade, fix prices or production, or lessen competition. The Act allows private parties to pursue litigation against violating companies.[63] One explicitly prohibited action is "price discrimination," which is defined as selling similar goods to buyers at different prices.[64] If an ISP varies the transmission speeds of similarly-situated edge providers to benefit one over the other, state competition law could be used as part of a layered approach that provides remedies to the aggrieved parties and sanctions the offending ISP.

New York's Donnelly Act prohibits any contract, agreement, arrangement, or combination that creates or maintains a monopoly or restrains competition.[65] It allows private parties to sue companies or individuals who participate in anti-competitive activity. One explicitly prohibited action is "tying," which is defined as selling a product or service on the condition that the buyer agrees to also buy a different product or service.[66] Therefore, if an ISP were to threaten to block or throttle service if an edge provider did not purchase some other service from them, it would constitute an antitrust violation.

Because other states tend to mirror these sorts of provisions, antitrust laws already provide states with the means and capability to cover many forms of ISP violations. Utilizing antitrust laws, rather than Section 706 or Title II enforcement, would avoid raising issues of federalism, state sovereignty, and dual enforcement capacity that threaten the stability and predictability of the regulatory and business environments.

---

[62] David J. Muchow & William A. Mogel, Energy *Law and Transactions,* § 105 (Mathew Bender, 2017).

[63] *The New York Donnelly Act*, Girard Gibbs LLP (Aug. 23, 2009), https://www.girardgibbs.com/antitrust/state-laws/new-york-donnelly-act/

[64] *Id*.

[65] *Id*.

[66] *Id*.

### 2. Consumer Protection

One common form of state consumer protection statutes comes through the application of "Baby FTC Acts." These acts are aimed at protecting consumers from "predatory, deceptive, and unscrupulous business practices."[67] Although the effectiveness of state enforcement of these laws varies widely, they represent an existing layer of consumer protection that abrogates the need for additional protection. State consumer protection laws, generally, fall into one of two broad categories: Those that prohibit unfair and deceptive practices and those that proscribe deceptive trade practices. All states have laws proscribing deceptive trade practices, while a small number of states also have laws proscribing unfair trade practices. However, each state agency has additional enforcement powers, and 49 states provide consumer remedies.[68] These states generally allow state Attorneys General to "obtain an order prohibiting a seller or creditor from engaging in a particular unfair or deceptive practice." These consumers can generally seek remedies like "return of payments or compensation for other consumer loss, sometimes an injunction against repetition of the fraudulent practices, and, in most states, reimbursement for attorney fees."[69]

Because many statutes provide broad, general protections against unfair and deceptive practices, they have significant substantive reach. The broad prohibition against deception allows states to "attack new methods of deception as they occur."[70] The broad prohibition against unfairness allows for similar, generalized regulatory coverage, covering practices such as "harassment, high-pressure sales tactics, and one-sided contract terms."[71] Blatant usage of blocking, throttling, or other discriminatory practices by ISPs to favor one edge provider over another or to otherwise control the flow of information would fall under these generalized protections.[72] As a result, ISPs would fall under this existing regulatory gamut.

Forty-three states and DC have laws prohibiting deceptive business practices that are enforceable by both consumers and state agencies.[73] A heavy-handed approach under Section 706 or Title II would compromise the states' ability to engage in independent decision-

---

[67] Carolyn L. Carter, Nat'l Consumer Law Ctr., A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 3 (2009).

[68] *Id*. at 17.

[69] *Id*. at 6.

[70] *Id*. at 11.

[71] *Id.*

[72] *See* TechFreedom, Comment Letter on Proposed Rule Restoring Internet Freedom (July 17, 2017), *at* 38-39.

[73] Carolyn L. Carter, Nat'l Consumer Law Ctr., A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 11 (2009).

making over the scale and scope of their broadband regulation by preventing implementation and operation of state law, changing the power and/or jurisdiction of state regulatory authorities, and creating a dual enforcement capacity that would create significant legal and regulatory confusion.

Thirty-nine states and D.C. have laws prohibiting unfair or unconscionable business practices that are enforceable by both consumers and state agencies.[74] California, for example, has two different consumer protection provisions; its Consumer Legal Remedies Act and its Unfair Competition Law. The latter is probably the broadest provision, enabling disaffected consumers to sue if a business engages in an "unlawful, unfair or fraudulent business act or practice" or if it advertises in an "unfair, deceptive, untrue or misleading" manner. Remedies are limited to restitution, but its particular benefit is an enlarged statute of limitations regarding damages. The former, while more structured, provides similar protections.

### 3. Consumer Protection State and Federal Case Studies

Searches for reported consumer protection cases fail to return any results for complaints that ISPs blocked or throttled consumer connections, or that they engaged in paid prioritization that harmed consumers. Amongst other searches, the search returning the most relevant results was a Boolean search using the terms "'consumer protection' & 'internet access' OR 'internet service.'" The scope of the search was as large as possible, drawing on results without limit to time or jurisdiction (state and federal). The search yielded 95 results from state court decisions. False positives were eliminated manually, by scanning each and every result returned.

The results are revealing. Beyond the cases cited by the 2015 Open Internet Order, there were *no* results including complaints against a single ISP for blocking, throttling, or paid prioritization practices. While complaints were absent, the cases found reveal that states' consumer protection regimes are sufficient to protect individual consumers from actual harms, along with conjectural harms where those harms violate representations made by the ISP (i.e., constitute deception) or where they constitution an "unfair" business practice.

The most common case type occurred between the late-1990s and the early 2000s. This type of case involved efforts to certify class action allegations against ISPs for fraud, misrepresentation and violation of state consumer protection laws regarding advertised internet connection speeds and reliability. The allegations, essentially, were that ISPs such as

[74] *Id.* at 12.

AOL, Verizon, and others promised specific download speeds and represented, or warranted, the continuity of the connection.[75]

In many of the cases, the appellate court or district court dismissed the complaints for any number of reasons. For some cases, the court believed the terms of service sufficiently disclaimed any warranties or representations.[76] For other cases, the court simply denied requested class action certification, leaving the plaintiffs to pursue individual causes of action.[77] Denial of class certification was largely based on findings that individual questions regarding harms predominated over common questions of law and fact.[78]

Where an ISP, through its practices, actually harmed consumers, state courts are quick to recognize the cognizable claim. For example, the California Court of Appeals denied a motion to compel arbitration in *Aral v. Earthlink, Inc.*[79] In this case, the defendant started charging customers DSL fees as of the dates they ordered service. To access the services, the customers needed the requisite modems and software. The defendant argued the Terms of Service (TOS) required arbitration. The court noted, though, that customers did not agree to the terms of service until they received both the modem and the necessary software to access the service. When the defendant billed customers for services they did not receive, no TOS were in place, and, according to the court, arbitration could not be compelled.

Similarly, the State of Washington refused to recognize a forum selection clause that would have skirted the state's consumer protection laws, when a defendant created secondary service accounts without customers' knowledge or permission. In *Dix v. ICT Group, Inc.*,[80] customers realized they were being billed for accounts they did not create. After investigations, they discovered the defendant had a practice of creating additional accounts under their names and them billing for those phantom accounts. The defendant tried to exercise the forum selection clause, moving the case to Virginia and litigating under Virginia's consumer protection laws. The Washington Court of Appeals denied the defendant's request

[75] *E.g. Waters v. Earthlink, Inc.*, 20 Mass.L.Rptr. 527 (2006), *Scott v. Bell Atlantic Corp.*, 726 N.Y.S.2d 60 (NY Sup. Ct. 2001).

[76] *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.2d 561 (Ky. 2012), *Forrest v. Verizon Communications, Inc.*, 805. A.2d 1007 (D.C. Super. Ct. 2002).

[77] *Solomon v. Bell Atlantic Corp.,* 777. N.Y.S.2d 50 (NY Sup. Ct. 2004), *Caspi v. Microsoft Network, LLC*, 732 A.2d 523 (NJ 1999).

[78] *See* Fed. R. Civ. Pro. 23, *Waters v. Earthlink*, *supra* note 75.

[79] 134 Cal.App.4th 544 (Cal. Ct. App. 2005).

[80] 106 P.3d 841 (Wash. Ct. App. 2005) *aff'd* 161 P.3d 1016 (Wash. Sup. Ct. 2007).

noting both the efforts to avoid consumer protection law and holding such efforts contrary to public policy in Washington.

Just as plaintiffs experimented with various tactics, so also did defendants. One of the most common tactics defendants selected, in an effort to avoid consumer protection litigation, was to include a Virginia choice of law provision in the terms of service. Virginia consumer protection laws do not provide stringent protections and make maintenance of class actions incredibly difficult. Some states sustained the choice of law provisions,[81] but most states determined that the defendants could not use a choice of law provision to skirt their states' consumer protection laws.[82]

There were two examples where state attorneys general brought suit on behalf of a number of consumers. In *State ex rel. Stenehjem v. Simple.Net, Inc.*,[83] the North Dakota appellate court determined that the state has concurrent authority with the FTC to investigate and prosecute alleged false and deceptive trade practices. In the case, the defendant, an ISP, sent "checks" to prospective customers. The checks, for $3.25, were listed as "discount incentives." When prospective customers cashed the checks, they were automatically enrolled in defendant's services, and it would begin billing at $19.95 per month. Though North Dakota launched an investigation into the practices, the FTC settled with the defendant a few years prior in a similar case brought in federal district court in Arizona. The defendant tried to use the Arizona settlement to forestall any liability in North Dakota, but the court disagreed noting the state had concurrent jurisdiction and was empowered to protect the citizens of the state.

In *State ex rel. Miller v. dotNow.com, Inc.*,[84] the Iowa attorney general's office received more than 200 complaints regarding the defendant's practices. The defendant, and ISP with roughly 5,100 customers, fought the attorney general's investigative subpoenas. The Iowa appellate courts disagreed with the defendant, and noted the attorney general's role in protecting consumers against unsavory business practices.

For federal cases, an identical search yielded 583 results. There were 67 cases decided by the Circuit Courts of Appeal and five by the Supreme Court. False positives were eliminated

---

[81] *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. Super. Ct. 2002), Caspi v. Microsoft Network, LLC, 732 A.2d 528 (NJ 1999).

[82] *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1 (2001), *Dix v. ICT Group, Inc.*, 106 P.3d 841 (Wash. Ct. App. 2005) *aff'd* 161 P.3d 1016 (Wash. Sup. Ct. 2007), *America Online, Inc. v. Pasieka*, 870 So.2d 170 (Fl. Ct. App. 2004).

[83] 735 N.W.2d 506 (ND 2009).

[84] 715 N.W.2d 768 (Table); 2006 WL 468313 (Iowa 2006).

by reading through each case. Other than relatively recent cases (*e.g.*, *USTelecom v. FCC*, *Verizon v. FCC*, and so on), very few addressed allegations that ISPs harmed consumers.

Federal cases can provide some insight regarding how both the federal government and states can continue prosecuting actual and hypothetical harms. Reading through state and federal cases, it is easy to see the FTC Act's influence on state consumer protection laws.

As with the state cases, federal cases strengthen the argument that existing consumer protection regimes are strong, and flexible, enough, to protect against both actual and conjectural harms. The issues decided by federal courts mirror the issues decided by state courts. These issues include actions against spammers,[85] actions alleging fraud and misrepresentation regarding internet speeds and reliability,[86] selling of personal data including telephone records,[87] and other similar issues.

One case worth highlighting is *FTC v. Accusearch, Inc.*[88] The FTC accused the defendant of the improper sale of highly personal data. The defendant represented itself as a company that could provide its clients with a wide range of data about private individuals. The data included information gleaned from public records, such as criminal convictions, information gleaned from web browsing habits and telephone records. The FTC argued that the collection and dissemination of telephone records was a "subversion" of the Telecommunications Act.[89] It further argued that individuals were likely to suffer emotional harm, that the defendant's researchers overrode passwords and encryption practices utilized by consumers, and that the disclosure of the records to third parties unknown to the consumers provided no "countervailing benefits."

The defendant tried to argue that, though it may have subverted the law, it violated no law. The court rejected the argument, stating that the defendant's "premise appears to be that a practice cannot be an unfair one unless it violates some law independent of the [FTC Act].

---

[85] *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040 (9th Cir. 2009). It is worth noting that actions against spammers fall within the exclusive jurisdictions of federal courts since the CAN-SPAM Act (15 U.S.C. §§ 7701, *et seq*.). *Gordon* also referenced the CAN-SPAM Acts limitations on which entities could bring enforcement actions. Under the law, certain federal and state agencies, state attorneys general, and ISPs adversely affected by violations of the law may maintain actions against spammers.

[86] *Grawitch v. Charter Communications, Inc*., 750 F.3d 956 (8th Cir. 2014) (Dismissing case alleging defendant failed to provide modems necessary to receive promised download speeds); *Fink v. Time Warner Cable*, 714 F.3d 739 (2nd Cir. 2013) (Dismissing case alleging provider misrepresented speeds and quality of connection); *Maloney v. Verizon Internet Services, Inc.*, 413 Fed.Appx. 997 (9th Cir. 2011).

[87] *FTC v. Accusearch, Inc.,* 570 F.3d 1187 (10th Cir. 2009).

[88] *Id.*

[89] *E.g.* 47 U.S.C. § 222(c)-(d).

But the [FTC Act] imposes no such constraint… On the contrary, the [FTC Act] enables the FTC to take action against unfair practices that have not yet been contemplated by more specific laws."[90]

In so doing, the court both recognized the FTC's role protecting consumer data and rejected the argument that the FTC is limited to violations of the law before its jurisdiction is triggered. Specifically, the court emphasized the FTC's role prosecuting *unfair* trade practices. The lawfulness of particular practices may serve as a component of the analysis, but lawfulness is not the sole determiner as to whether a corporate practice is unfair.

Many hypothetical harms cited by Title II supporters are not currently unlawful, at least according to statute. But this does not strip the FTC, or state equivalent entities, of its authority to prosecute unfair and/or deceptive trade practices. As discussed in a prior filed Comment,[91] a number of ISPs have pledged to implement principles of net neutrality. Should an ISP violate its pledge to maintain an open internet, it may be subject to consumer protection actions initiated by harmed consumers, state attorneys general, and/or the FTC.

Consumer protection laws predicated on preventing unfair and deceptive trade practices have a particular advantage available neither to regulations such as the 2015 Open Internet Order and legislation. They are flexible enough to provide consumer protection agencies sufficient grounds to bring enforcement actions in the face of ever-changing technologies. The technologies may change from year-to-year, but the principle that state and federal governments should ensure companies and individuals do not harm residents endures throughout the years.

## B. Common Law

Besides statutes, the common-law offers another layer of protection for consumers. The development of common-law causes of action allow for consumers and/or state agencies to pursue remedies for industry violations. Like any other industry, consumers of products and services from the broadband industry would be subject to these common-law protections. These protections would help reassure consumers, reinforce industry discipline, and repair any gaps in state statutory laws.

[90] *Accusearch,* 570 F.3d at 1194 (internal citations omitted).

[91] *See* the American Legislative Exchange Council, Comments in Support Proposed Rulemaking of Restoring Internet Freedom, WC Docket № 17-108 at 3.

### 1. Fraud

One form of common-law protection is restitution for fraudulent action or behavior. Fraud is generally defined as "deliberately deceiving someone else with the intent of causing damage."[92] Although the precise definition for a specific offense varies from jurisdiction to jurisdiction, they generally involve some sort of material, false representation that was relied upon by the plaintiff to his or her detriment. For broadband consumers, a common-law fraud right of action would protect against ISPs knowingly engaging in conduct that violates an agreement with edge providers. Blocking, throttling, and other forms of discriminatory treatment could all be seen as violating the edge providers' expectation of service, if they meet a certain standard of materiality and knowledge.

A 2001 court case in New York demonstrates the potential applicability of fraud claims. In *Scott v. Bell Atlantic Corporation*, the New York Supreme Court heard a case in which the plaintiffs alleged that defendant Bell Atlantic Corp. (now Verizon) misrepresented the quality of their DSL service. One of the causes of action was for fraudulent inducement. Although the Court held that the plaintiffs failed to "sufficiently allege that defendants, with scienter, misrepresented material fact in order to induce plaintiffs' reliance and that they reasonably relied on the representations to their detriment,"[93] the court gave the claim due consideration. This means that a fraud claim could be valid, if the facts demonstrated detrimental reliance. A case in which blocking, throttling, or other discriminatory practices are being considered could easily meet a standard of detrimental reliance — *i.e.*, when a consumer relies on the representations in the ISP's terms of service, but does not get a promised service. Therefore, common-law fraud claims are one possible remedy for ISP wrongdoing.

### 2. Breach of Contract

Another form of common-law protection is restitution for breach of contract. Breach of contract is defined as the violation of a contractual obligation through the repudiation of a promise, failing to perform a promise, or interfering with another party's performance.[94] The elements for a breach of contract generally involve failure of performance by the defendant and a resulting economic loss by the plaintiff. For broadband consumers, a common-law breach of contract cause of action would protect against ISP violation of terms, conditions, or representations made under contract. ISP manipulation of data transmission

---

[92] *Cornell Legal Information Institute definition*, https://www.law.cornell.edu/wex/fraud (last visited Aug. 30, 2017).

[93] *Scott v. Bell Atlantic Corp.*, 726 N.Y.S.2d 60 (2001).

[94] *Id.*

or discrimination would almost certainly violate the terms of service, and could easily lead to an "economic loss" for edge providers. Therefore, aggrieved parties would have a good case for a cause of action on breach of contract grounds. By using a common-law breach of contract framework, states can protect consumer and provider rights under contract, and set a standard of enforcement that may lessen the need for federal intervention.

In fact, the only formal complaint filed under the FCC's net neutrality rules highlights a potential role for common-law breach of contract claims. The complaint alleges that Verizon broke a series of promises through various misrepresentations. In particular, two of the claims seem to have merit as potential net neutrality violations. If proven, they could serve as examples of how the common law could be part of a larger broadband regulatory effort.

The first claim is that Verizon interferes with its customers' ability to use the devices of their choice.[95] Specifically, the claim states that Verizon blocked the use of Nexus 7 Tablets for 22 weeks and Apple iPhone 6 and iPhone 6 Plus Devices for 47 weeks by disallowing customers from "ordering SIM cards for devices it doesn't elect to certify."[96] The complaint goes on to state that this action "compels customers to purchase devices preloaded with Verizon-backed applications from the carrier and affiliated retailers instead of competing sources (*e.g.*, Amazon, craigslist, eBay, other carriers, and independent retailers)."[97] If the inability for customers to use the devices of their choice was found to be a misrepresentation, it could constitute a repudiation or failure to perform a promise. If this was the case, then breach of contract claims would have merit as a means to pursue restitution, and could help mitigate some of the constitutional and jurisdictional problems of Section 706 and Title II regulation.

The second claim is that Verizon limits customers' ability to use the applications of their choice and edge providers' ability to develop the applications of their choice by blocking a variety of applications.[98] Specifically, the claim states that Verizon "blocked customers from using Pay with PayPal (to suppress competition against Isis Wallet), Samsung Pay (to suppress competition against Android Pay), and Samsung Internet (to inhibit customers from filtering out advertising and tracking elements used by companies like AOL/Verizon)."[99] The complaint goes on to state that "the carrier blocked Pay with PayPal for at least 10

[95] Federal Communications Commission, In the Matter of Alex Nguyen v. Cellco Partnership & Affiliated Entities, Formal Complaint and Legal Analysis (July 26, 2016), *at* 14.

[96] *Id*. at 16.

[97] *Id.*

[98] *Id.* at 33.

[99] *Id.* at 72.

days, Samsung Pay for at least 23 days, and Samsung Internet 4.0 for at least 17 days."[100] Similar to the device misrepresentation, the blocking of specific applications could constitute a repudiation or failure to perform a promise. This could lay the grounds for a potential breach of contract claim.

Therefore, although the complaint was filed with the FCC, the arguments laid out could just as easily have application for common-law breach of contract claims. The utilization of state agencies or courts to hear these sorts of claims could help avoid constitutional or jurisdictional confusion, while possibly expediting the resolution of individual cases.

### 3. Tort

A third form of common-law protection is torts: acts or omissions that give rise to injury or harm to another. Injury is generally defined as the invasion of a legal right, and harm is generally defined as a loss or detriment in fact that an individual suffers.[101] Because a plaintiff can generally only bring a tort or breach of contract claim through the same cause of action, the specific jurisdiction and substance of the claim would determine the superior claim. For broadband consumers, a common-law tort cause of action would protect against a violation of their legal rights, as stipulated by terms and representations made in the contract. This would include things like a protection against unlawful data disclosure and any manipulation or violation of contractual terms. By using a common-law tort framework, states could further protect consumer and provider rights, while reducing the need for federal intervention.

## C. Examples of State Enforcement Action

### 1. NY Lawsuit Against Spectrum-Time Warner Cable

The New York Attorney General's recent complaint against Spectrum-TWC illustrates a variety of causes of action that could be used to police broadband providers. The complaint, filed this February, alleges "from at least January 1, 2012 to the present, Spectrum-TWC conducted a systematic scheme to defraud and mislead subscribers to its Internet service by promising to deliver Internet service that it knew it could not and would not deliver." According to the complaint, this action is being brought pursuant to Executive Law Sec. 63(12) and General Business Law Article 22-A, Secs. 349 and 350.[102] This means that New

[100] *Id.* at 73.

[101] Id. available at https://www.law.cornell.edu/wex/injury

[102] *New York v. Charter Commc'n, Inc.*, No. 450318/2017, 2017 WL 448883 (N.Y. Sup. Feb. 1, 2017) (Compl. ¶ 3.) available at https://ag.ny.gov/sites/default/files/summons_and_complaint.pdf, at 9-10.

York feels as if there is sufficient evidence to warrant bringing charges under state law, and suggests that New York has subject-matter jurisdiction to cover broadband violations under its statutory fraud provisions.

The first cause of action specifically mentions throttling, stating that Spectrum-TWC failed to "maintain sufficient port capacity to ensure that subscribers would not experience buffering, slowdowns, interruptions, lags, down times or other indicators of unreliable Internet service."[103] It also specifically mentions false representations, stating that the company failed to "maintain sufficient port capacity to ensure that subscribers could reliably access Netflix, online games and other specifically promised sources of content."[104] A successful claim on these grounds would demonstrate how fraud statutes could be used to police net neutrality .

The third cause of action specifically mentions false advertising, stating that Spectrum-TWC engaged in "leasing subscribers older-generation, single-channel modems and deficient wireless routers that were incapable of delivering the promised speeds" and "promising subscribers wireless speeds that Spectrum-TWC could not deliver, including by omitting to disclose the real-world conditions that significantly limit wireless performance."[105] The false advertising claim is being brought under General Business Law Sec. 350, suggesting that state statutory law can address cover ISP misrepresentations.

### 2. Class Action Lawsuit Against CenturyLink

On June 26, 2017, a class action lawsuit was filed in the U.S. District Court of Colorado alleging that CenturyLink added charges to its customers' accounts. The complaint alleges that the company "engaged in a widespread and continuous practice of designating customers as having additional accounts that they had not requested or approved, charging customers more than the quoted price for contracts, charging termination fees for canceling contracts, and continuing to bill customers after they closed their accounts."[106] The court claims jurisdiction under the Class Action Fairness Act.[107] The use of this Act to bring suit suggests that existing class action law can be leveraged to bring weight to common-law claims, at least in

[103] *Id.* at 73.

[104] *Id.*

[105] *Id.* at 75. The latter claim appears to involve wi-fi interference within the customer premises, rather than net neutrality concerns. Still, it illustrates the potential for the kind of causes of action that could be brought under state law regarding net neutrality concerns.

[106] *Class Action Complaint and Jury Trial Demand at 2, Chavez v. CenturyLink, Inc.*, No. 1:17-cv-01561 (D. Colo. filed June 26, 2017) available at https://localtvkdvr.files.wordpress.com/2017/06/centurylink-lawsuit.pdf, [*hereinafter* Chavez Complaint].

[107] 28 U.S.C. § 1332(d) (2012).

circumstances where the nature and scale of the wrongdoing justify its use. This means that there are at least a some circumstances in which common-law causes of action can be effectively used in class actions against ISPs.

The first cause of action alleges that CenturyLink engaged in "deceptive, unconscionable, and/or unfair business practices."[108] Because the complaint charges that CenturyLink intentionally overcharged, mischarged, and fraudulently-charged customers,[109] it would meet the criteria for a fraud claim. The inclusion of this charge in the complaint suggests that prosecutors believe that there is (1) at least a reasonable chance that fraud has occurred and (2) a reasonable chance that the claim would be successful on the merits.

The second cause of action alleges that CenturyLink "overcharged Plaintiff and the Class in violation of those contracts and/or failed to provide the services promised to Plaintiff and to the Class."[110] This directly implicates a breach of contract cause of action under the common law, because the allegation claims that the company broke its contractual obligations to its customers.

While these claims have yet to be adjudicated, they are illustrative of the kinds of state law claims that could discipline broadband providers.

## IV. Conclusion

The FCC's novel conception and implementation of its authority has significant implications for the states. Particularly, it raises issues related to federalism and state sovereignty. The *Verizon* court's view of Section 706(a) of the Telecommunications Act as an independent grant of authority had the two-fold effect of (1) amplifying state PUC powers without action by the state legislatures and (2) misapplying judicial doctrine to reach an unjustified result. The classification of broadband under Title II authority raises serious issues of constitutional interpretation, jurisdictional authority, and market certainty.

State statutes and the common-law help ensure an adequate redress of consumer grievances. States generally have strong antitrust and consumer protection laws that allow state agencies, private actors, or both to file suit against ISPs. For any statutory gaps, the common-law could provide remedies such as fraud, breach of contract, or tort claims. The utilization of these remedies not only offers various means of consumer protection, but also could provide a better guide to broadband providers as to what actions they can and can-

[108] Chavez Compl. at 8.

[109] *Id*.

[110] *Id*.

not take. If the FCC were to finally cease attempting to regulate net neutrality, it would allow the states to begin to develop a body of law on broadband through what the Supreme Court long ago called the "the gradual process of judicial inclusion and exclusion."[111] Although state law remedies do not represent a panacea for ISP wrongdoing, they should be seen as an important part of a larger, layered regulatory approach.

The return to a Title I classificatory regime would further these objectives by reducing constitutional, administrative, and market uncertainty. The restoration of pre-*Verizon* and pre-Title II conceptions of federalism and state sovereignty would allow state PUCs to operate under the assumptions originally made by state legislators. We urge the FCC to consider these arguments and return to a clearer, light-touch regulatory framework.

[111] *FTC v. Raladam Co.,* 283 U.S. 643, 648 (1931).